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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GEORGE FIEGL, Plaintiff and Respondent, v. VAN BUREN ESTATES PARTNERS, LP, et al., Defendants and Appellants.	E061131 (Super.Ct.No. INC1204442) OPINION

APPEAL from the Superior Court of Riverside County. Lawrence W. Fry, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Laura J. Fuller and Mark J. Rice for Defendants and Appellants.

Goode, Hemme & Peterson and Jerry D. Hemme for Plaintiff and Respondent.

INTRODUCTION

Defendants and appellants Van Buren Estates Partners LP (VBEP), Van Buren Estates, LLC (VBE I), Van Buren Estates II, LLC (VBE II), and Thomas Lodato appeal from a judgment in favor of plaintiff and respondent George Fiegl. Plaintiff's action included breach of contract, intentional fraud, fraudulent concealment against VBEP, VBE I, and VBE II, intentional misrepresentation, conspiracy to commit fraud, and conspiracy to commit breach of fiduciary duty against Lodato.[1] Defendants contend: (1) the cause of action for fraud was improperly pled; (2) the trial court gave an improper jury instruction as to conspiracy to breach fiduciary duty; (3) the trial court erred by continuing the trial with Stukenbrock in absentia and/or in failing to sever the claims against Stukenbrock; (4) the trial court should have granted the motion in limine to preclude references to illegal or criminal conduct; (5) the trial court should have granted defendants' motion for nonsuit; (6) plaintiff should have been held to his election of a contract remedy; and (7) the trial court should have granted their motion for a new trial. We affirm the judgment.

[1] Judgment was also entered in favor of plaintiff against defendant Christian Stukenbrock on causes of action for fraud, conspiracy, breach of fiduciary duty, and negligence. Stukenbrock failed to attend the trial, and he is not a party to this appeal. In addition, judgment was entered in favor of defendant Henry Skade, who is also not a party to this appeal. Unless the context indicates otherwise, references to defendants herein are to the current appellants only.

FACTS AND PROCEDURAL BACKGROUND[2]

The Parties

Fiegl is an individual who lent $7.2 million to VBEP for the development of an almost 164-acre parcel known as Van Buren Estates (the Property), located near La Quinta. The loan was secured by a second deed of trust on the Property.

Van Buren Estates Lenders, L.L.C. (VBEL) held a senior deed of trust on the Property securing a loan in the amount of $10.45 million. VBEL is not a party to this action.

Stukenbrock was Fiegl's financial advisor and had served in that role for two years before Fiegl's loan. Stukenbrock failed to appear at trial.

VBEP was the owner of the Property.

VBE I and VBE II were the general partners of VBEP.

Lodato and Skade were managing members of VBE I and VBE II.

The Project

In 2005, Lodato and Skade formed VBE I and VBE II to purchase the Property with the intent to procure entitlements for a final map and sell the Property to a builder (the Project). Lodato and Skade had been in similar ventures for about 15 years. In 2006, Lodato and Skade refinanced the Property with a $13 million loan from ACM Investors (ACM) secured by a first deed of trust against the Property, and a second deed

[2] On January 29, 2016, appellant filed a request for judicial notice. On February 23, 2016, this court issued an order indicating the ruling was reserved for consideration with the appeal. The court has reviewed the request, the opposition, and the response to the opposition. The request for judicial notice is denied.

of trust loan in the amount of approximately $5 million. Both loans were due in one year, but by "late fall of 2007," the payments had fallen behind and interest was past due. Defendants had to refinance the loans or sell the Property by December 31, 2007.

In the summer of 2007, Lodato and Skade had a private placement memorandum (Partners PPM) prepared to solicit equity investments in a partnership that would own the Property. They sent the Partners PPM to Atherton Lane Advisers (Atherton), an investment firm of which Perry Olson and Gary Patterson were managing members. The solicitation raised approximately $10 million. VBE I and VBE II transferred their interests in the Property to VBEP and served as general partners of VBEP. The money raised was used to pay off the second deed of trust and to bring ACM's senior loan current. Lodato and Skade obtained an extension of the senior loan until December 31, 2007, at which time that loan was all due and payable.

Meanwhile, a tentative tract map was approved for the Property on October 2, 2007, subject to numerous conditions required by the County of Riverside before a recordable final map would be allowed. However, on October 24, 2007, defendants' civil engineer learned from representatives of the Coachella Valley Water District (CVWD) that CVWD had two easements running down the middle of the proposed subdivision, and those easements were not shown on the tentative tract map. The CVWD further stated that offsite water and sewer had to be relocated, and a water tank was required that could cost up to $2 million.

As a result of CVWD's easements, defendants had to either start over and redraw the map, which would have been about a two-year process, or relocate the easements

within the existing plan. The offsite water and sewer could also substantially increase the costs of the Project. The engineer testified that it would require $43,000 to make an accurate estimate of the cost of relocating the easements. The engineer was not authorized to prepare that estimate until April 2008. The missed easements were shown in the title documents. However, Fiegl did not read them, and he testified he received the title documents after the closing.

At a meeting in December 2007, CVWD agreed to allow relocation of the easements and related facilities within the Project, subject to approval of the design. In January 2008, defendants' land planner requested CVWD to start the process for a special agreement for relocation of the easements.

After Atherton's investment in the Property, Olson became aware that the $13 million ACM loan was due on December 31, 2007, and there was no commitment in place to refinance it. Olson was concerned because (1) the lending market was drying up, and (2) if ACM was not paid, it could foreclose, and Atherton would lose its entire investment. Olson introduced Lodato and Skade to John Romero, a mortgage broker, and he told Skade, "[Y]ou need to be all over this." Lodato indicated they had been working with multiple loan brokers, but had not received an acceptable proposal. Romero's efforts likewise did not bear fruit. On December 19, 2007, the Project manager, Steven Kleeman, told Lodato and Skade about the missed easements and the water and sewer issues.

Lodato and Skade obtained an extension of the ACM loan until March 1, 2008, for payment of more than $390,000. Olson agreed to raise $10 million for a loan to VBEP

through a separate entity, VBEL, of which Romero would serve as manager. The loan was to be secured by a first trust deed on the Property and carried an interest rate of 12 percent. A new private placement memorandum (Lenders PPM) was prepared and sent to investors. The Lenders PPM stated that a loan fee of up to three percent would be paid to the lender on the second position loan.[3] Release of the funds from VBEL was conditioned on Lodato and Skade funding an additional $7 million from another loan. Olson had calculated that Lodato and Skade needed about $17.5 million to cover the costs required to obtain final map approval.

Lodato had a business and social relationship with Stukenbrock, who was plaintiff's financial advisor. Lodato learned that plaintiff was interested in investing money. Stukenbrock arranged two meetings between plaintiff and Lodato; the first in late 2007 or early 2008 and the second on February 22, 2008. Stukenbrock attended both meetings. Lodato told plaintiff that he and Skade were experienced real estate developers, and he showed Fiegl a map depicting lots in the Project. He also gave plaintiff an appraisal of the land prepared by Raymond Dozier in December 2007, which showed the value of the Property as $35 million. Lodato stated the Property had plenty of equity, and that the Project was "pretty much imminent for completion."

Lodato showed plaintiff the Partners PPM. Plaintiff was not interested in an equity investment, but only in making a secured loan, so he did not read the Partners

[3] The Lenders PPM provided that a junior loan to be obtained from an individual lender "will require payment of fees of up to 3 percent of the principal amount (also payable when such loan is made)."

PPM. Plaintiff told Lodato that Stukenbrock was his financial advisor. There was no discussion of any fee to Stukenbrock. There was also no discussion about relocation of easements, offsite water and sewer facilities because Lodato did not think they were important. There was no discussion about possible delays, and no discussion about whether the other lender's loan would be conditioned on plaintiff's loan. At that point, plaintiff was the only private investor who was considering taking a second position loan.

Lodato arranged for his attorney to draft plaintiff's promissory note and deed of trust. The face amount of the promissory note was $10 million, but the amount of money plaintiff funded was $7.2 million. The interest was due in two years and, in the interim, VBEP was not required to make any payments. Plaintiff's loan was junior to that of the first lender, VBEL. Stukenbrock requested Lodato send him the title report and the Lenders PPM; however, Stukenbrock did not share those documents with plaintiff before close of escrow.

The Fee to Stukenbrock

In March 2008, Stukenbrock sent Lodato an invoice from Silicon Valley Technology Group (SVTG), a company co-owned by Stukenbrock and plaintiff, for $250,000; the invoice stated it was for "investment consulting services." Stukenbrock also included instructions regarding how to wire the fee. Lodato forwarded the instructions to Skade, who instructed the bank to wire the money to SVTG. Skade handwrote an entry in his bank register to record the payment as "points on second loan." Skade explained that he meant the payment was a loan fee to the lender. He also testified

that in his mind, the $250,000 payment was compensation to Stukenbrock for arranging the loan.

Lodato testified at his deposition that the $250,000 payment was a payment that Stukenbrock "was demanding for his role in the loan happening" for plaintiff.

After escrow closed, Skade emailed Olson asking for the first distribution. Olson had not been "aware of the $250,000 fee to the intermediary." Olson assumed the fee was "for acting as a representative and bringing in the investors with the $7 million investment." Lodato told Olson it was a "placement fee." Olson believed the fee "seemed very high." Olson sent a letter to VBEP disclosing the fee because he felt the $250,000 was material information for the investors to know.

Romero also had not been aware "of a $250,000 fee to intermediary" until he received Skade's email requesting the first distribution. Romero also thought the fee was high. Romero reviewed the Lenders PPM, but he did not associate the language referring to a loan fee of up to three percent to the principal with Stukenbrock.

When plaintiff's loan eventually went into default, he examined the loan more closely and learned that a fee of $250,000 had been paid to Stukenbrock. Plaintiff questioned Lodato about it, and Lodato represented that the payment had been made in exchange for equity and share in SVTG. At trial, Lodato testified that the $250,000 fee paid to Stukenbrock was a loan fee for plaintiff to be paid to SVTG. Lodato had Skade instruct the bank as to how to wire the money to SVTG.

Plaintiff testified that under his informal oral compensation agreement with Stukenbrock, he would give Stukenbrock 15 to 20 percent of proceeds on other deals

arranged by Stukenbrock, plus expenses, and one to two percent for overhead. The $250,000 paid to Stukenbrock in this transaction was approximately the same percentage plaintiff agreed to pay him from SVTG for another 49 investments Stukenbrock had secured for plaintiff; however, this differed from the other transactions because it was a loan, not an investment.

Lodato had represented to the escrow officer on March 10, 2008, that there would be no loan fees. The $250,000 payment was not reflected on the closing statement.

Lodato testified he had given the Lenders PPM to Stukenbrock. Plaintiff testified he had not received the Lenders PPM before making the loan.

Events After the Loan

Plaintiff's loan came due in March 2010. However, by then, the real estate market had crashed; the loans for the Project were in default and could not be repaid or refinanced, and the Property could not be sold. VBEL obtained title to the Property in a nonjudicial foreclosure on March 18, 2013.

In 2011, plaintiff filed a separate civil action in Santa Clara County against Stukenbrock alleging Stukenbrock had defrauded him in numerous transactions. Plaintiff eventually obtained a judgment against Stukenbrock for over $31 million.

In July 2013, plaintiff filed a first amended complaint against VBEP, VBE I, VBE II, Lodato, Skade, and Stukenbrock to collect on the promissory note and to assert fraud claims for misrepresentation and nondisclosure of material facts. Plaintiff also filed applications for a temporary protective order and a right to attach order and moved to create a lien on a judgment that VBEP had been awarded against Stewart Title Company

for denying coverage on the missed easements. The trial court granted plaintiff a preliminary injunction, a right to attach order, and a writ of attachment and later granted plaintiff a lien against the Stewart Title Company judgment. VBEL filed a separate suit (case No. INC1206888) to foreclose against Fiegl as junior lienholder and VBEP as borrower. VBEL was ultimately awarded the title insurance judgment proceeds in the separate action, and this court affirmed that ruling. (See *Van Buren Estates Lenders, LLC v. Fiegle* (Aug. 18, 2015, E060094) [nonpub. opn.].)

Before trial, the parties entered into a stipulation as to facts and judgment for breach of contract against VBEP, VBE I, and VBE II for the principal amount of $7.2 million plus prejudgment interest from the date of the breach on March 21, 2010.

Additional facts are set forth in the discussion of the issues to which they pertain.

DISCUSSION

Adequacy of Pleading Fraud

Defendants contend the cause of action for fraud was improperly pled. They argue that although the first amended complaint listed causes of action for fraud and negligent misrepresentation, they were not put on notice until the discussion of jury instructions that they would be defending against torts of intentional fraud, misrepresentation, fraudulent concealment, conspiracy to commit fraud, and conspiracy to commit breach of fiduciary duty.

Additional Background

In his operative first amended complaint, plaintiff listed causes of action for fraud and negligent misrepresentation among other causes. Specifically, plaintiff alleged that

Stukenbrock had acted as his financial advisor for about two years and held a position of trust and confidence with him. Plaintiff was unaware that Stukenbrock and Lodato had a business and personal relationship and were partners in a business venture; that relationship was a material fact never disclosed to plaintiff. Before soliciting a loan from plaintiff, Lodato discussed his need for capital with Stukenbrock. Plaintiff alleged that defendants conspired to solicit a loan from him and, pursuant to the conspiracy, they agreed to present misleading information about the Property that would make it appear that VBEP had the ability to timely repay the loan and that the Property had the value to support secured loans in excess of $20 million. Plaintiff alleged that Lodato and Skade agreed to pay Stukenbrock a fee to use his position of trust to induce plaintiff to make the loan, and a fee of $250,000 was paid to Stukenbrock for his services. Defendants falsely represented that they would net approximately $4 million from the loan to finance the final entitlement. In fact, the entire loan paid off debt, delinquent taxes, and loan charges.

Plaintiff further alleged that defendants knew of, but failed to disclose, the easements held by the CVWD and failed to disclose the increased costs and delay relocating the easements would cause. Defendants knew those facts were material to plaintiff's decision to make the loan and intended their representations to induce plaintiff to make the loan. Plaintiff made the loan based on defendants' representations and was justified in his reliance on defendants; as a result, plaintiff suffered damage.

Defendants answered the first amended complaint and proceeded to trial on the fraud claim. Following trial, the jury found VBEP, VBE I and VBE II liable for intentional fraud and fraudulent concealment, and also found Lodato and Stukenbrock

liable for intentional misrepresentation, fraudulent concealment, conspiracy to commit fraud, and conspiracy to commit breach of fiduciary duty. Judgment was entered against defendants in the principal amount of $7.2 million.

Analysis

To object to a defect in the pleadings, a party must raise the objection in a demurrer or answer, or the defect is waived. (*Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449, 469.) More specifically, when a complaint alleges fraud in general terms, the defendant must demur to the complaint on the ground that the cause of action for fraud has not been sufficiently alleged, or any such defect in the pleading is waived. (*Mack v. White* (1950) 97 Cal.App.2d 497, 499-500.) Defendants failed to raise the issue of insufficient pleading of the fraud cause of action in the trial court, and the issue may not be raised for the first time on appeal. (*Ibid.*)

Defendants contend, however, that the issue was not forfeited because they were not put on notice of the multiple fraud theories until the proposed jury instructions. They assert they unsuccessfully objected to those jury instructions. Defendants have failed to provide any citations to the record to show what objections were made and how the court ruled on those objections. The record page citations they provide direct this court only to the instructions themselves and the special verdict forms. "'It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations.' [Citations.] If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999)

72 Cal.App.4th 849, 856.) (We separately address defendants' challenge to the instructions on conspiracy, *post*.)

Defendants further contend that the issue was not forfeited because they were not put on notice by the allegations of the first amended complaint that they would be required to defend against causes of action for intentional fraud, misrepresentation, fraudulent concealment, conspiracy to commit fraud, and conspiracy to commit breach of fiduciary duty. We disagree. The allegations of the complaint, as summarized *ante*, adequately gave notice to defendants of the causes of action against them. Specifically, it alleged that defendants conspired to solicit a loan from plaintiff and agreed to present misleading information about the Property, VBEP's ability to timely repay the loan, and the value of the Property to support secured loans. It further alleged that defendants knew of, but failed to disclose, material facts concerning increased costs and delays to development. We conclude defendants' challenge to the pleading is untimely.

Jury Instructions

Defendants contend the trial court gave an improper jury instruction as to conspiracy. They argue that by instructing the jury with CACI Nos. 400, 600, and 3600, Lodato could be found liable in fraud "simply for Stukenbrock's negligence (hung together by [an] alleged violation of a strict liability statute, [Business and Professions Code section] 10138)." They further argue that the instructions improperly allowed the jury to find Lodato liable for conspiracy to breach fiduciary duty when such a theory was unavailable as a matter of law. While we assume for purposes of argument that the jury should not have been instructed on conspiracy to breach fiduciary duty, we nonetheless

conclude that such instruction did not result in any miscarriage of justice requiring reversal of the judgment because the jury awarded the same amount of damages on multiple theories.

Standard of Review

"'The propriety of jury instructions is a question of law that we review de novo.'" (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 418.)

Additional Background

Defendants requested the trial court instruct the jury with proposed "special jury instruction #4," which stated: "A borrower does not owe a fiduciary duty to his lender. Therefore, the fiduciary duty claim of Plaintiff Mr. Fiegl applies only to his own agent, Christian Stukenbrock, and not to the other defendants. [¶] Additionally, if you find Christian Stukenbrock liable for breach of fiduciary duty, but not liable to Plaintiff for fraud, then there is no basis to find conspiracy to defraud by the other defendants. For there to be a conspiracy it must be a conspiracy to defraud."

The trial court rejected defendants' request and instructed the jury with CACI 3600 as follows:

"Fiegl claims that he was harmed by defendants' fraud and that all defendants are responsible for the harm because they were part of a conspiracy to commit fraud. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing or may be implied by the conduct of the parties.

"If you find that the defendants committed a fraud, and that harmed Fiegl then you must determine whether each of the defendants are also responsible for the harm. Each of the defendants, or the defendants that you find participated in the conspiracy, is responsible if Fiegl proves both of the following:

"1. That the defendant was aware that another defendant planned to pay an undisclosed fee or not disclose material facts to Fiegl and

"2. That each defendant agreed with another defendant and intended that the payment of the undisclosed fee or nondisclosure of material facts to Fiegl be committed.

"Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make a defendant responsible for the harm.

"A conspiracy may be inferred from the circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged coconspirators. Fiegl is not required to prove that each defendant personally committed a wrongful act or that he knew all the details of the agreement or the identity of all the other participants.

"Fiegl claims that he was harmed by Stukenbrock's breach of fiduciary duty and that all defendants are responsible for the harm because they were part of a conspiracy to Stukenbrock's breach of fiduciary duty. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing and may be implied by the conduct of the parties.

"If you find that Stukenbrock breached his fiduciary duty to Fiegl, and that harmed Fiegl then you must determine whether each of the defendants are responsible for the

harm. Each of the defendants, or the defendants that you find participated in the conspiracy, is responsible if Fiegl proves each of the following:

"1. That the defendant acted in furtherance of his own financial gain.

"2. That the defendant was aware that another defendant planned to pay an undisclosed fee or not disclose material facts to Fiegl, and

"3. That each defendant agreed with the other defendants and intended that the payment of undisclosed fee or nondisclosure of material facts to Fiegl be committed.

"Mere knowledge of a wrongful act without cooperation or agreement to cooperate is insufficient to make a defendant responsible for the harm.

"A conspiracy may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged conspirators. Fiegl is not required to prove that each defendant personally committed a wrongful act or that he knew all the details of the agreement or the identities of all the other participants."

CACI No. 600 instructed the jury as to the duties of a commercial loan broker and CACI No. 400 provided, "Fiegl claims that he was harmed [by] Stukenbrock's negligence. To establish this claim, Fiegl must prove all of the following: [¶] 1. That Stukenbrock was negligent; [¶] 2. That Fiegl was harmed; and [¶] 3. That Stukenbrock's negligence was a substantial factor in causing Fiegl's harm." Defendants did not object to instructing the jury with CACI Nos. 400 and 600.

The jury found Stukenbrock liable to plaintiff under theories of negligence, breach of fiduciary duty, intentional misrepresentation, and concealment. The jury further found

that Lodato was liable to plaintiff under theories of intentional misrepresentation and concealment. The jury also found both Stukenbrock and Lodato liable to plaintiff under theories of conspiracy to commit fraud and conspiracy to breach fiduciary duty. Finally, the jury found that both Stukenbrock and Lodato conspired to not disclose the fee and to conceal material facts.

Analysis

The instructions did not permit the jury to base Lodato's liability for conspiracy on Stukenbrock's mere negligence. Noting that the breach of a broker's duty to the principal encompasses both negligence and intentional conduct, defendants argue that under the instructions given, Lodato could have been found liable for conspiracy based merely on the jury's finding of Stukenbrock's negligence. We disagree. In its special verdict, the jury specifically found that Lodato was "aware that the other defendants *planned* to pay an undisclosed fee and/or not disclose material facts" to plaintiff and "agree[d] with another defendant and intend[ed] that the payment of the undisclosed fee and/or nondisclosure of material facts to [plaintiff] be committed." (Italics added.) The jury made the same special findings as to the conspiracy to commit fraud cause of action. Because the instruction required the jury to find that the actions of another defendant—here, Stukenbrock—were *planned*, the jury could not reasonably find that Stukenbrock's mere negligence could lead to Lodato's liability for conspiracy.

Even assuming error in the instruction on conspiracy to commit breach of fiduciary duty, no miscarriage of justice resulted. Defendants argue that it was improper to instruct the jury on conspiracy to commit breach of fiduciary duty because a party

cannot be liable for conspiracy to breach a duty the party does not possess. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 510-511; *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 592.) Plaintiff responds that an exception to that general rule exists when the alleged conspirator acts in furtherance of his own financial gain, citing *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 46. We need not determine whether that exception continues to exist, because even if we assume error in the instruction on conspiracy to breach fiduciary duty, such error does not require reversal of the judgment itself. "[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580.)

Here, the jury did not return a general verdict, but found in favor of plaintiff against Lodato in special verdicts on the four different theories (intentional misrepresentation, fraudulent concealment, conspiracy to commit fraud, and conspiracy to commit breach of fiduciary duty), which were presented to it. The jury found that plaintiff's damages were $7.2 million under each theory, and the judgment reflects damages of $7.2 million plus interest. Thus, even if the jury was incorrectly instructed as to one theory, reversal is not required because the judgment can be supported on any of the other unchallenged theories. (Cf. *Lundy v. Ford Motor Co*. (2001) 87 Cal.App.4th

472, 480 [reversal is required if there is no way to eliminate the likelihood that in entering a general verdict, the jury chose a theory as to which it was misinstructed].) In other words, even if we were to reverse a single verdict, it would have no effect on the judgment itself.

Denial of Severance

Defendants contend the trial court erred by continuing the trial with Stukenbrock in absentia and/or in failing to sever the claims against Stukenbrock. Defendants argue that they were prejudiced because the case against Stukenbrock was "uncontradicted and compelling," whereas the case against the remaining defendants was "always weak."

Additional Background

On the eve of trial, September 5, 2013, Stukenbrock filed an application for an ex parte order continuing trial. The next day, an ex parte hearing to continue trial was held, wherein argument was presented by counsel for plaintiff. Stukenbrock was not listed as appearing on the minute order. The trial court subsequently denied the continuance request and ordered the parties to appear for trial on September 11, 2013.

Defendants filed a motion in limine to bifurcate the proceedings. The trial court denied the motion. Defendants filed another motion in limine requesting an order excluding evidence or argument that Stukenbrock breached his fiduciary duty if Stukenbrock failed to appear for trial or, in the alternative, for an instruction that claims of Stukenbrock's breach of fiduciary duty applied only to him and not to the remaining defendants. While defendants assert that the trial court denied the motion, the record

indicates that the trial court reserved its ruling. The trial proceeded with Stukenbrock in absentia.

Analysis

It is within the trial court's discretion whether to consolidate or sever trials: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." (Code Civ. Proc., § 1048, subd. (a); see *McArthur v. Shaffer* (1943) 59 Cal.App.2d 724, 727.) We will not disturb the trial court's decision in the absence of a clear showing of abuse of discretion. (*Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 976, 978-979.)

Defendants rely on the standard that applies in criminal cases, in which denial of a motion for severance "may be an abuse of discretion if the evidence related to the joined counts is not cross-admissible; if evidence relevant to some but not all of the counts is highly inflammatory; if a relatively weak case has been joined with a strong case so as to suggest a possible 'spillover' effect that might affect the outcome; or one of the charges carries the death penalty." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1283.) This is manifestly no such case. Moreover, in *People v. Soper* (2009) 45 Cal.4th 759, our Supreme Court held, in the context of a capital defendant's motion to sever trial of two murder charges, "[i]f the evidence underlying the charges in question would be cross-admissible, *that factor alone* is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Id.* at pp. 774-775,

italics added.) A fortiori, the same standard applies to the trial court's resolution of a motion to sever trials in a civil action.

Plaintiff's first amended complaint alleged that, without his knowledge, Stukenbrock and Lodato were partners in a business venture; that Lodato had discussed his need for capital with Stukenbrock; that defendants agreed to present misleading information to plaintiff to solicit a loan; and that Lodato agreed to pay a $250,000 fee to Stukenbrock for his services in inducing plaintiff to make the loan. Thus, evidence of Stukenbrock's dealings with plaintiff and defendants in connection with the loan was not only relevant and admissible, it was inextricably intertwined with plaintiff's complaint against the other defendants. Under those circumstances, severance of Stukenbrock's trial would not have resulted in exclusion of such evidence at defendants' trial; rather, it would have led to "unnecessary costs or delay." (Code Civ. Proc., § 1048, subd. (a).) We conclude the trial court did not abuse its discretion in denying the motions for severance or bifurcation. (*People v. Soper, supra*, 45 Cal.4th at pp. 774-775.)

Motion in Limine to Exclude Reference to Business and Professions Code Section 10138

Defendants contend the trial court should have granted their motion in limine to exclude reference to Business and Professions Code section 10138 (hereafter section 10138). Defendants contend "the irrelevant and prejudicial references permeated the trial, as its core theme."

Standard of Review

"We review a trial court's evidentiary rulings for abuse of discretion." (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1026.)

Additional Background

Defendants moved in limine before trial to exclude testimony, opinions, and arguments in reference to section 10138. Defendants argued that such evidence and argument "should be excluded as irrelevant, lacking foundation (no knowledge) and prejudicial and confusing. Such would involve an extended discussion that Mr. Lodato is not licensed, that he was unaware of the statute, he believed Stuckenbrock [*sic*] was licensed, and did not knowingly violate or violate [*sic*] the statute, due to his lack of knowledge. Even then, it is irrelevant since the fee was disclosed in the [Lenders] PPM, and is not the claim being paid, for return of fee. It does not prove fraud absent a showing he knew and he did not, and in fact, was told the opposite, and the [Lenders] PPM shows the fee was disclosed. Mr. Lodato gave those documents to Plaintiff and/or his agent, and the existence of the fee was disclosed, not a secret, and on the table, not under it."

At the hearing on the motion, the trial court asked plaintiff's counsel if he was going to bring up that defendants had committed a crime or had only violated a statute. Plaintiff's counsel responded that he would only argue a violation of a statute. The trial court stated, "We're not going to get into a crime here. On [Evidence Code section] 352, I would keep that out." Defendants' counsel then argued, "And, Your Honor, if they agree to stop using the word 'illegal,' every place in the jury instruction, 'illegal fee,'

'illegal fee,' like we are criminal. I think that's highly prejudicial for them to do that." The trial court denied the motion.

Thereafter at trial, plaintiff's counsel stated in his opening statement that "[t]here will be no dispute" that the $250,000 payment to Stukenbrock outside escrow "was illegal." Defendants' counsel did not object to the statement. Plaintiff's counsel further stated that "this illegal payment had been made." Defendants' counsel did not object to the statement. Plaintiff's counsel stated, "By the end of the case, the evidence is going to show you that the payment was unlawful and shouldn't have been made and that Stukenbrock took that money and pocketed it." Defendants' counsel did not object to the statement.

During cross-examination of defendants' expert witness, John D'Andrea, plaintiff's counsel asked him if he was aware that California law "makes it illegal to pay a fee for arranging a loan through an unlicensed person." Defendants' counsel objected on the ground that the question mischaracterized the law, and the trial court overruled the objection. The expert testified he had not been aware of that law prior to this case. Without objection, the expert further testified, in response to questions whether he had believed it was legal or illegal to pay a fee to an unlicensed person for arranging a loan, that he had not previously known one way or another and had not considered it.

During closing argument, plaintiff's counsel argued that Stukenbrock had violated California law by taking the $250,000 fee, and "[t]he defendants violated it by facilitating payment to him." Defendants' counsel did not object. Plaintiff's counsel argued that "it's unlawful for someone to pay an unlicensed person or pay someone who fails to

present a license. That testimony is uncontradicted, and it's common sense. That legal requirement is there to prevent these sorts of things from happening." Defendants' counsel did not object. Plaintiff's counsel argued, "Now can you facilitate an illegal payment and then say, oh, well, it's not our fault? We thought the agent would say something." Defendants' counsel did not object. Plaintiff's counsel used as demonstrative evidence a timeline with the words, "Illegal Payment to Stukenbrock" as its title. However, at defendants' request, a sticky note was placed over the word "'illegal'" before the exhibit was published to the jury.

Plaintiff requested the trial court instruct the jury based on the language of section 10138. The trial court sustained defendants' objection and denied the request. Defendants requested special instructions on lack of criminal intent due to ignorance or mistake of fact and on defense of ignorance of the law regarding conspiracy to commit a crime. The trial court denied those instructions.

Relevance of Challenged Evidence

Defendants argue that evidence and argument concerning section 10138 was irrelevant and therefore inadmissible. (*Winfred D. v. Michelin North America, Inc.*, *supra*, 165 Cal.App.4th at p. 1026 ["'No evidence is admissible except relevant evidence.'"].) Defendants contend that section 10138 was inapplicable because no real estate commission had been paid, "the $250,000 was a *loan* fee," and section 10138 "is irrelevant to the payment of a loan fee to a *lender*." However, as a leading commentator has explained: "The definition of acts requiring a real estate broker's license includes several aspects of real estate financing. A real estate broker's license is required for any

of the following: [¶] (1) Soliciting or negotiating loans on behalf of lenders or borrowers as an agent for compensation, or performing services or collecting payment for note owners, if the loans are secured directly or collaterally by real property or a business opportunity." (2 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 4:12, p. 4-30.) James Hibert, plaintiff's expert witness in commercial real estate lending, testified that in his opinion, the fee came within that section because of Stukenbrock's actions in "negotiating a real estate loan, negotiating a loan that involved a trust deed, negotiating a loan that involved land potential with a lease in the future, reviewing documents that were associated with a real estate loan, and obtaining a loan for a borrower."

The evidence that a $250,000 fee was paid to Stukenbrock and that such payment was made outside of escrow was indeed relevant to plaintiff's case. Plaintiff alleged that the fee had not been disclosed. Although defendants argue that the fee was in fact disclosed in the Lenders PPM, plaintiff testified he had not received that document before making the loan.

The closer question is whether evidence that the payment of the fee violated the statute also was relevant to the issues. By the terms of the statute, the escrow holder would have committed a misdemeanor and incurred a fine if it had paid the fee to Stukenbrock without determining that he was a licensed real estate broker, and payment of the fee through the escrow would have provided notice to plaintiff of the fee. Thus, the existence of the statute could explain, at least in part, why the payment was made outside escrow, and that was plaintiff's theory of the relevance of the statute.

Defendants contend that because the statute includes no mens rea requirement, violation of the statute was irrelevant to conspiracy claims. They rely on *People v. Meneses* (2011) 193 Cal.App.4th 1087, in which the court held that no conspiracy arises if the alleged crime was not one known to the defendant. Plaintiffs requested special instructions based on that case. However, plaintiffs confuse the elements of the crime of conspiracy with the doctrine of conspiracy that applies in a civil case. A criminal conspiracy is an agreement entered into with the specific intent to agree to commit a crime, followed by an overt act committed by one or more of the parties to accomplish the object of the agreement. (See Pen. Code, § 182.) Thus, defendants' discussion of mens rea in criminal conspiracy cases and their argument that Business and Professions Code section 10138 is a strict liability statute are not relevant.

Defendants cite several cases in support of their argument that admission of the evidence and argument was error. (See *Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286; *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102; *People v. Paniagua* (2012) 209 Cal.App.4th 499.) Those cases generally address whether admission of evidence of statutory violations resulted in a miscarriage of justice or whether such evidence was properly excluded.

Here, even if we assume error in the admission of the section 10138 evidence, defendants have failed to establish that such error resulted in a miscarriage of justice because they fail to provide any meaningful discussion of the evidence presented at the lengthy trial. As noted *ante*, we must assess actual prejudice by evaluating *the state of*

the evidence, the effect of counsel's arguments, and any indication the jury was actually misled, among other things. (*Soule v. General Motors Corp*., *supra*, 8 Cal.4th at pp. 580-581.) Defendants contend, however, that their appeal is based on legal error.

Defendants argue that the following circumstances indicate that the jury would have ruled differently without the challenged evidence: (1) plaintiff's repeated reliance on that evidence; (2) the length of jury deliberations; and (3) the jury's finding that Skade was not liable. Plaintiffs undeniably relied on the challenged evidence, as recounted *ante*. However, the length of jury deliberations—two days, following the 10-day trial—does not, in our view, demonstrate that the jury might have reached a different verdict had the challenged evidence been excluded. In *People v. Houston* (2005) 130 Cal.App.4th 279, 301, for example, the court recognized that "the length of a jury's deliberation is related to the amount of information presented at trial." Thus, "[t]he jury's deliberation of this mass of information over the course of [several] days speaks only for its diligence." (*Ibid.*) Finally, the jury's finding that Skade was not liable for either form of fraud or conspiracy does not lead us to conclude that the challenged evidence was unduly prejudicial to Lodato. Skade had not had any direct dealings with Stukenbrock before the loan was made. However, Skade, not Lodato, wrote the wire instructions to the bank for the loan fee to be paid to SVRG. The differing verdicts as to Lodato and Skade simply indicate to us that the jury carefully considered the evidence as to each defendant individually.

Although defendants fail to discuss the evidence that supported the jury's fraud verdicts, plaintiff presented evidence that Lodato had represented himself as an attorney

and successful real estate developer and that Lodato told him that completion of the Project was imminent. In addition, plaintiff presented evidence that Lodato knew, but failed to disclose, that CVWD's easements through the Property had to be relocated, that there would be an unknown but substantial cost for such relocation, and that CVWD had changed requirements for offsite facilities, which could add substantial costs to the Project. Lodato also knew that the appraisal he had provided to support the value of the security had not accounted for the changes leading to additional costs and delays.

Any argument that plaintiff's counsel violated the spirit of the trial court's ruling has been forfeited by failure to object in the trial court. Defendants appear to argue that plaintiff's counsel violated the spirit of the trial court's ruling and committed the equivalent of attorney misconduct by "refer[ring] to a crime, over and over, even if it used the words 'illegal' or 'unlawful' instead of 'crime.'" The trial court did not rule that such words could not be used. Defendants' counsel never objected at trial on the ground that any of the statements they now challenge on appeal violated the spirit of the trial court's ruling. Thus, they have forfeited any contention that plaintiff's counsel committed misconduct or violated the trial court's ruling. (See, e.g., *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1163 [""""Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection *and a request that the jury be admonished*. . . . In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.""""].) Defendants contend they had no ability to object after the trial court denied their motion in limine.

However, their motion in limine did not encompass any objection concerning the spirit of the trial court's ruling. (See *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 158-159.)

In any event, although defendants challenge the trial court's ruling allowing plaintiff to use the terms "unlawful" and "illegal," those terms did not mischaracterize payments made in violation of section 10138. Rather, California courts have previously described as "unlawful" payments made to unlicensed individuals for services requiring a license and as "illegal" a contract entered into for such payments. (See, e.g., *Richardson v. Roberts* (1962) 210 Cal.App.2d 603, 606; *Merrifield v. Edmonds* (1983) 146 Cal.App.3d 336, 345.)

Balancing of Prejudice and Probative Value

Defendants contend the trial court failed to weigh the prejudice of the Business and Professions Code section 10138 evidence against its probative value. Evidence Code section 352 does not require the trial court to recite any magic words. Rather, the trial court must "make apparent on the record, prior to exercising its discretion, its consideration of the factors which threatened prejudice against the probative value of the evidence." (*People v. Garrett* (1987) 195 Cal.App.3d 795, 801.) In the present case, defense counsel raised the prejudicial effect of admitting the evidence, and the trial court expressly referred to Evidence Code section 352 in ruling that plaintiff could not refer to a crime. Thus, the record demonstrates that the trial court properly considered the factors which threatened prejudice against the probative value of the evidence.

Exclusion of Expert Testimony

Defendants contend the trial court erred by striking the testimony of plaintiff's expert on cross-examination in which defense counsel attempted to establish that section 10138 may be violated by a principal who fails to verify that his agent has the necessary license.

In cross-examining plaintiff's expert Hibert, defense counsel attempted to obtain an admission based on a hypothetical situation that a violation of section 10138 can occur without wrongdoing, by the client or employer of the unlicensed broker, not just by the adverse party. The court struck Hibert's testimony on the ground that it was based on an improper hypothetical situation. Defendants now argue that in doing so, the trial court "created an erroneous and prejudicial double standard that excused STVG's/Fiegl's $250,000 payment to Stukenbrock but vilified Lodato as to payment by VBE of the loan fee to SVTG/Fiegl, for the same act—failure to verify."

The trial court did not abuse its discretion in excluding the proffered evidence. The evidence was offered to show that plaintiff, as well as defendants, violated the statute by making a payment to Stukenbrock. However, that was not an issue at this trial.

Motion for Nonsuit

Defendants contend the trial court should have granted their motion for nonsuit. They assert that the evidence established no liability for fraud because (1) plaintiff failed to read disclosures that provided notice of the fee to Stukenbrock, and (2) plaintiff judicially admitted that he had relied solely on Stukenbrock in making the loan.

Standard of Review

A defendant is entitled to nonsuit only if the trial court determines, as a matter of law, that the evidence presented by the plaintiff is insufficient to allow a jury to find in his favor. In making that determination, the trial court may not weigh the evidence or consider the credibility of the witnesses but must accept as true the evidence in favor of the plaintiff and must disregard conflicting evidence. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) On appeal, we review the denial of a motion for nonsuit in the light most favorable to the plaintiff, and we reverse only if no substantial evidence exists tending to prove each element of the plaintiff's case. (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 263.)

Additional Background

In his unverified initial complaint in a separate action against Stukenbrock, plaintiff had alleged, "STUKENBROCK knew that PLAINTIFF lacked expertise that enabled him to ascertain the truth or falsity of his representations, and would as such rely solely on STUKENBROCK's representations." In their motion for nonsuit, defendants argued that the allegation constituted a conclusive judicial admission. At the hearing on the motion, plaintiff's counsel represented that the allegation had been made in plaintiff's initial unverified complaint in his separate suit against Stukenbrock; Stukenbrock had demurred to that complaint; and an amended complaint had been filed that omitted the allegation. The trial court denied the motion for nonsuit. The trial court allowed the allegation to be used for impeachment.

Analysis

"Judicial admissions may be made in a pleading, by stipulation during trial, or by response to request for admission. [Citations.] Facts established by pleadings as judicial admissions '"are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted by the party whose pleadings are used against him or her."'" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.)

We reject defendants' argument that the trial court erred in failing to treat plaintiff's prior pleading as a binding judicial admission.

First, "'[a] judicial admission is effective (i.e., conclusive) *only* in the particular case.'" (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456, quoting 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 453, p. 586, italics added.) Defendants rely on plaintiff's pleading in a separate action.

Second, although a superseded pleading may be used as an admission against interest, the pleader must be allowed to explain the changes. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 426.) A party cannot offer evidence contrary to a pleading "'*unless permitted to amend*,'" and "a court has inherent power to relieve a party from the effects of judicial admission by amendment to the pleadings." (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1272." Here, plaintiff's counsel explained that the new counsel had recognized that the initial allegation had not been accurate, and an amended pleading had been filed. We conclude the trial court did not

abuse its discretion in declining to treat the initial pleading in the Stukenbrock case as a conclusive judicial admission.

Failure to Read Disclosures

Defendants next contend that plaintiff failed to establish fraud because he, a successful businessman and entrepreneur who had attorneys and Stukenbrock to advise him, failed to read the Lenders PPM or escrow instructions. A plaintiff who has failed to read documents provided, which disclose material facts, cannot establish fraud based on nondisclosure of the same facts. (See, e.g., *Rosecrans v. Dover Images, Ltd*. (2011) 192 Cal.App.4th 1072, 1080.)

Defendants argue that the $250,000 loan fee was disclosed to plaintiff directly. The citations to the record they provide in support of that contention show that plaintiff testified that in March or April 2010, Lodato told plaintiff in a telephone conversation that "they paid [Stukenbrock] 250,000," but there was no characterization of the payment. Stukenbrock had previously denied receiving any fee as compensation. Disclosure of the fee in 2010, years after the loan was made, was legally irrelevant.

Defendants further contend that the loan fee was disclosed indirectly in the Lenders PPM, which was provided to plaintiff through Stukenbrock. Defendants appear to argue that the mention of a loan fee in the Lenders PPM provided notice as a matter of law. However, plaintiff's expert Hibert testified that the language of the Lenders PPM indicated to him that the payment was to be made to the lender, not the broker, and such payment would be made through escrow at the closing.

Election of Remedy

Defendants contend plaintiff elected a contractual remedy, and he should have been held to that election to the exclusion of his tort causes of action. As noted *ante*, plaintiff pursued both contract and tort causes of action against VBEP, VBE I, and VBE II but only tort causes of action against Lodato. The parties stipulated to judgment for plaintiff on the contract cause of action.

Under the doctrine of election of remedies, "[w]here a person has two concurrent remedies to obtain relief *on the same state of* facts, and *these remedies are inconsistent*, he must choose or elect between them." (*Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1218.) The doctrine does not bar election of remedies for both breach of contract and fraud that arise from different obligations and different operative facts. (*General Ins. Co. v. Mammoth Vista Owners' Assn.* (1985) 174 Cal.App.3d 810, 828; *Symcox v. Zuk* (1963) 221 Cal.App.2d 383, 391 (*Symcox*) [even after levying writs of attachment, plaintiff could pursue both a fraud cause of action, which arose from defendant's fraudulent representations inducing plaintiff to enter into a contract, and a breach of contract cause of action, which arose from the breach of the contract]; *Pat Rose Associates v. Coombe* (1990) 225 Cal.App.3d 9, 18-19, disapproved on another ground in *Adams v. Murakami* (1991) 54 Cal.3d 105, 116.)

Defendants rely on *Estrada v. Alvarez* (1952) 38 Cal.2d 386, 390-391, and *Steiner v. Rowley* (1950) 35 Cal.2d 713, 720-721, in which the courts held that plaintiffs were estopped to pursue damages for fraud when they had obtained attachment in pursuit of contract remedies. However, the court in *Symcox* distinguished those cases, explaining

that "in each only one cause of action was present, pleaded in different ways under two or more theories. That is to say, only one primary right was violated and the various counts or causes of action were all directed at the vindication of that right." (*Symcox*, *supra*, 221 Cal.App.2d at p. 391.) In *Waffer Internat. Corp. v. Khorsandi* (1999) 69 Cal.App.4th 1261, the court explained that when the plaintiff obtained an attachment against a corporate defendant, it did not bar his pursuit of tort claims against individual defendants because: (1) it was doubtful that the doctrine of election of remedies in the context of attachments was still viable because cases relying on that doctrine dealt with superseded attachment laws; (2) even if the doctrine survived, it did not apply because the plaintiff's claims against the corporate defendant in a parallel action arose from operative facts different from those giving rise to his claim against the individual defendants; and (3) the doctrine did not apply because the plaintiff obtained attachment against the corporate defendant, not against the individuals, and the individuals were not legally prejudiced by the attachment remedy. (*Id.* at p. 1268.)

Defendants contend the doctrine of election of remedies still applies when the attachment has caused prejudice. They assert they suffered prejudice because the attachment led VBEL to foreclose on the first trust deed, and defendants thereby lost their entire investment in the Property. Defendants misconstrue the meaning of prejudice in this context. As one court has explained, "Under current circumstances, it is incongruous to speak of any defendant being 'substantially prejudiced' by enforcement of the plaintiff's statutory rights. Attachment now can be had only after the intervention of an impartial judge who orders attachment only after holding a hearing, making evidentiary

findings, etc., with full due process protections." (*Waffer Internat. Corp. v. Khorsandi*, *supra*, 69 Cal.App.4th at p. 1279.) Here, likewise, defendants were not legally prejudiced by plaintiff's use of the attachment process.

We conclude plaintiff could pursue both his breach of contract action, which arose from the failure to repay his loan, and his tort causes of action for fraudulent representations and conspiracy to commit fraud, which led him to enter into the agreement. (*General Ins. Co. v. Mammoth Vista Owners' Assn.*, *supra*, 174 Cal.App.3d at p. 828; *Symcox*, *supra*, 221 Cal.App.2d at p. 391; *Pat Rose Associates v. Coombe*, *supra*, 225 Cal.App.3d at pp. 18-19.)

Motion for New Trial

Defendants contend the trial court should have granted their motion for new trial. Defendants contend that in denying their motion in limine to exclude evidence and argument concerning section 10138, the trial court "gave counsel permission to use the word illegal." They contend that because of the trial court's ruling, plaintiff's counsel's use of that term was not attorney misconduct, but led to the same type of prejudice as in attorney misconduct cases.

Additional Background

On March 7, 2014, defendants filed points and authorities in support of their motion for new trial. Defendants argued, among other things, that they had suffered prejudice from the use of section 10138 evidence and argument at trial. Following a hearing, the trial court denied the motion for retrial.

Analysis

We have previously addressed defendants' challenges to the use of section 10138 evidence and argument *ante*, and we have concluded that even if we assume error, it did not lead to a miscarriage of justice. We therefore conclude the trial court did not err in denying the motion for new trial.

DISPOSITION

The judgment is affirmed. Costs are awarded to plaintiff and respondent.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.